IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3490 OF 2004

Shri Jairam Karsanbhai Rathod .. Petitioner.
Vs.
Karsanbhai Dahyabhai Rathod
deceased through LRs
Bhagwan Karsanbhai Rathod & Anr. .. Respondents.

Mr.C.G.Patil for the petitioner.
Smt.Suhasini Mutalik for respondent no.1.

CORAM : D.B.BHOSALE, J.
DATED : 25TH SEPTEMBER, 2006

P.C.:

. Heard learned counsel for the petitioner and respondent no.1.

2. This petition is arising from the orders passed by the courts below on the application at Exhibit-42 filed by the petitioner in Darkhast No.213/2001. Respondent no.1 is the decree holder whereas respondent no.2 is the judgment debtor. The petitioner and respondent no.1 are real brothers. Respondent no.1 - decree holder had filed a suit against respondent no.2 - judgment debtor for ejectment and it was decreed on 3rd July, 1999. Admittedly, the matter was carried upto the Supreme Court and the decree was confirmed. Respondent no.1 - decree holder claimed right in the suit tenament on

the basis of the Will executed by his father, the original owner of the suit property. The probate proceedings in respect of the Will of petitioner's father were also contested and it had reached the Supreme Court in which it was ultimately held that the probate was not necessary. The petitioner, till all the litigation got over did not assert any right whatsoever in the suit premises nor did he applied for impleading him as party in those proceedings. Similarly, he has not challenged the Will of his father by which the suit tenament was willed to the decree holder. It is against this backdrop the application at Exhibit-42 filed by the petitioner has been rejected by both the courts below. In that application, the petitioner claimed that respondent no.2 - judgment debtor surrendered the suit tenament to him and he is in possession thereof as the co-owner, being the heir of his father. He further stated that the decree accordingly stands satisfied and, therefore, the Darkhast Proceedings may be dismissed with cost. Mr.Patil, learned counsel for the petitioner submitted that his right in the suit tenament will have to be determined in the execution proceedings as provided for under Rule 101 of Order 21 of CPC. Both the courts below after having considered the submissions of the petitioner have recorded a categoric finding that the judgment debtor is in

possession of the suit property till this date and in view thereof the claim of the petitioner of having taken possession from the tenant cannot be accepted and, in my opinion, it has rightly been rejected by the courts below for the reasons stated in the impugned order. Considering that there are concurrent findings recorded by the courts below and as I find that there is sufficient material on record to sustain those findings and considering extremely limited jurisdiction of this Court under Article 227 of the Constitution of India to interfere with the findings of facts this writ petition cannot be entertained. The writ petition is, accordingly, dismissed. If the petitioner has any right in the property it is open for him to adopt a remedy, if any, available in law about which I express no opinion. The interim order stands vacated.

(D.B.Bhosale, J.)